# In the High Court of Judicature for Rajasthan
# Jaipur Bench

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1- Cr. Misc. Petition No.312/2001
M/s Cynamid Agro India Ltd. & 10 Ors.
***Versus*** State
2- Cr. Misc. Petition No.495/2001
M/s Searle India Ltd. & 7 Ors.
***Versus*** State & 4 Ors.

**Date of Order ::: 20/09/07**

***Hon'ble Mr. Justice Ajay Rastogi***

Mr. Reashm Bhargava, for petitioners
Mr. Arun Sharma, Public Prosecutor for State.

At request, both the petitions were finally heard and are being disposed of by common judgment, because grounds of challenge to orders taking cognizance of offence punishable U/s 29(1) of Insecticides Act, 1968 (“**the Act**”) and issuing process against petitioners are one and the same.

**Cr. Msc. Petition 312/2001** U/s 482 CrPC is directed against order dt.05/09/95 taking cognizance of offence U/s 29 of the Act and summoning petitioners in Cr. Case No.217/95 pending before Addl. Chief Judl. Mag. No.3, Ajmer.

Petitioner Nos.2 to 5 are Managing Directors/Vice President/Directors and Petitioner No.6 is their Sales Manager nominated and while Nos.7 to 12 are dealers of petitioner No.1-M/s

Cynamid India Ltd. (“**Company**”), engaged in manufacturing pesticides.

On 30/06/1994, in exercise of power U/s 21(1) of the Act, Insecticide Inspector (Plant Protection), Ajmer inspected M/s Rajasthan Agro Industries Corporation Ltd., manufacturing unit of petitioner-Co., at Ajmer and took sample of “Thimet 10-G (Phorate 10%)” with manufacturing date April, 1994 and expiry date October, 1995 and sealed in three containers each containing 250 gms whereof. One sealed container of the sample was sent for analysis to State Pesticides Testing Laboratory Bikaner, Jaipur which vide report dt.25/07/94 showing active ingredient content to be 8.76% and since it did not conform to its specification; so was considered to be misbranded in view of S.3(k) of the Act - a copy whereof alongwith show cause notices was sent by Insecticide Inspector to petitioners – in response whereof, petitioners sent their reply vide letters dt.10th/12th & 18th August, 1994 denying report of State Pesticides Laboratory and intended to adduce evidence in contra-version of report dt.25/07/94, as provided U/s 24(3) of the Act.

It appears that despite intention shown

by petitioners accused within 28 days of show cause notice, no steps were taken by Insecticide Inspector to get referee sample re-tested through Central Insecticide Laboratory.

After obtaining written consent from competent authority U/s 31(1) of the Act vide prosecution sanction dt. 02/11/94, filed complaint for prosecution against petitioners as well as other accused for offence U/s 29(1)(a) of the Act on 05/09/95. However, the complaint was registered and learned Magistrate took cognizance of offences (supra) on 05/09/95 and issued process against petitioners for 31/10/95 and shelf life of the sample also expired in October, 1995, itself.

**Cr. Msc. Petition 495/2001** U/s 482 CrPC is directed against order dt.09/01/96 and summoning petitioners in Cr.Case No.06/98 pending before Judicial Magistrate No.3, Jaipur City.

Petitioner Nos.2 to 5 are Directors and NO.6 is their sales Manager, and petitioner No.1-M/s Searle India Ltd. (“**Company**”), engaged in manufacturing pesticides.

On 28/09/1994, in exercise of power U/s 21(1) of the Act, Insecticide Inspector (Plant Protection), inspected M/s Om Agro Agencies,

Bhankrota Jaipur which is licensed retailer of petitioner-Co., and took sample of “Fenwal-20EC (Fenvalerate-20% EC) – batch No.2423 with manufacturing date July, 1994 and expiry date June, 1996 and sealed in three containers each containing 100 gms whereof. One sealed container of the sample was sent for analysis to State Pesticides Testing Laboratory Bikaner, which vide report dt.23/11/94 showing active ingredient content to be 18.22% and it was considered to be misbranded in view of S.3(k) of the Act as it does not conform to requisite specifications - a copy whereof alongwith show cause notices was sent by Insecticide Inspector to petitioners – in response whereof, petitioners sent their reply vide letters dt.15th/20th/21/12/94 controverting report of State Pesticides Laboratory & intended to adduce evidence in contra-version of report dt.23/11/94, as provided U/s 24(3) of the Act.

It appears that despite intention shown by petitioners accused within 28 days of show cause notice, no steps were taken by Insecticide Inspector to get referee sample re-tested through Central Insecticide Laboratory and by the time, summons could be served upon petitioners, shelf life of pesticide sample has expired in June,

1996. Be that as it may, referee sample was belatedly sent for analysis by Central Pesticides Laboratory, which in its letter dt.08/10/96 endorsed remarks ad infra :

> "**2**. Thus, the above sample is date expired sample. Analyss of such a sample may not provide a conclusive evidence about quality of the product. Such date expired products are likely to have unknown degrated products. Accordingly. The analysis of the sample sent by you is not being undertaken.."

After obtaining written consent from competent authority U/s 31(1) of the Act vide prosecution sanction dt.28/08/95, ultimately, on 09/01/96, Insecticide Inspector filed complaint for prosecution against petitioners as well as other accused for offence U/s 29(1)(a) of the Act. However, the complaint was registered and learned Magistrate took cognizance of offences (supra) vide order dt.09/01/96 and issued process against petitioners and other accused vide order dt.01/03/96. Hence both these petitions are filed for quashing proceedings against petitioners.

Counsel for petitioners submits that manufacturing Company and its Directors are arrayed as accused but complaint does not

disclose as to how and in what manner the petitioners/Directors were in-charge of or responsible to the Company for conduct of its business, inasmuch as complaint also does not disclose commission of offence on the part of petitioners with their consent or connivance or because of their negligence, which are necessary ingredients as contemplated in S.33 of the Act in order to launch prosecution against the Directors /Officers of the Company for holding them vicariously liable; which are completely lacking in instant cases and vague reference has been made which is not a sufficient compliance of mandatory requirement as provided U/s 33 of the Act. In support, Counsel placed reliance upon decision of Apex Court in **Municipal Corporation of Delhi Vs. Ram Kishan (AIR 1983 SC 67)** and of this Court in **Bharat Insecticides Vs. State ((1997(1) WLC 690)**, taken note of by **DB** of this Court in **M/s Cadila Health Care Ltd Vs. State (2007(1) RLR 389)**.

Counsel further submits that very consent accorded by authority for prosecution U/s 31(1) of the Act is without application of mind because neither facts constituting offence nor grounds for satisfaction are contained in the

order and that apart, it does not even state name of insecticide inspector or the date on which sample was taken nor does it recite name of insecticide sample and how the sample was found to be misbranded. In support, Counsel placed reliance upon decisions of this Court in **P.R.Neelkantham Vs. State (1986 RLW 70); Agarwal Khad Bhandar Vs. State (1993 RCrC 607) & M.s SN Chemical Vs. State (2000(1) WLC 720) M/s B.A.S.F. India Ltd. Vs. State (2004 WLC (UC) 350)**.

Counsel further submits that once the petitioners (accused) disputed report of State Pesticide Laboratory, yet sample was not sent to the Central Laboratory and by the time, summons could be served upon them, shelf life of sample itself has expired, which has resulted in violating their statutory right to get the sample re-tested U/s 24(4) of the Act. In support, Counsel placed reliance upon seriesof decisions of Apex Court in **Municipal Corporation of Delhi Vs. Ram Kishan (supra); State of Haryana Vs. Unique Farmaid (1999(8) SCC 190=SCC(Cr) 1404) and of this Court in United Phosphorus Vs. State (2002 (2) CrLR (Raj) 826) & Tikayat Kisan Vikas Vs. State (2005(2) CrLR (Raj.) 1456).**

Per contra, Public Prosecutor supported

the order and submits that whatever objections raised herein are available for the petitioners to make at the stage of trial and as such both the petitions deserve to be dismissed.

I have considered contentions of both the parties and with their assistance, perused material on record. It is admitted case of parties that pesticide sample taken by Insecticide Inspector on being tested by State Pesticide Laboratory was found to be misbranded in both the cases and this report was controverted by petitioners herein who submitted their reply raising objection denying the allegation in the test report within statutory period of 28 days as provided U/s 24(3) of the Act and request was made that referee sample be sent to the Central Laboratory but before it could be re-analysed, shelf life of sample in question has expired and that being so no opinion could have been expressed by Central Laboratory in both the cases, as taken note of by this Court in course of narration of facts (supra).

In order to appreciate, it would be convenient to refer S.33 of the Act ad infra -

> **“33. Offences by companies. (1)** Whenever an offence under this act has been committed by a company, every

person who at the time of offence was committed, was in charge of, or was responsible to the Company for the conduct of the business of, the Company, as well as the company, shall be deemed to be guilty of the offence and shall liable to be proceeded against and punished accordingly.

***Provided*** that nothing contained in this sub-section shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

**(2)** Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, Manager, Secretary or other office of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

Provisions (supra) spells out that offences alleged to have been committed by Companies, every person who at the time of commission of offence were in charge or or responsible for the

Company for conduct of its business, as well as the Company shall be deemed to be guilty of offence. Sub-section (2) of S.33 means the person being responsible inasmuch as it is not sufficient unless he is in-charge of or responsible to the Company for conduct of its business and that being so, S.33(2) further clarifies that it has to be proved that offence has been committed with the consent or connivance which can be attributable to any neglect on the part of Director/Manager, Secretary or other person of Company, who can alone be prosecuted and punished.

In both the instant petitions, relevant paras of complaint in order to examine issue are reproduced ad infra :

**Cr. Msc. Petition 312/01**

"**8.** यह है कि अभियुक्तगण संख्या 3 मैसर्स एटोज एग्रिको प्राइवेट लिमिटेड, जयपुर अमानक कीटनाशी वितरक को इस कार्यलय पत्रांक 3087-92 दिनांक 28.071.1994 द्वारा अमानक कीटनाशी विक्रय करने पर कारण बताओ नोटस दिया गया । (प्रति संलगन है)
एटोज एग्रिको का लाइसेंस व शपथ पत्र, माल खरीद का बील, स्टोक रजिस्टर व माल एग्रो को बेचने के तीन बीलो का फोटो प्रतियाँ एटोज में उनके पत्र क्रमांक बिल दिनांक 30 अगस्त 94 द्वारा भेजी संलगन है। "

"9- यह है कि अभियुक्त संख्या 7 मैसर्स सायनामिड इण्डिया लि नई दिल्ली की अमानक कीटनाशी निर्माता को भी इस

कार्यालय पत्रांक 3087-92 दिनांक 28-7-94 द्वारा अमानक कीटनाशी विक्रय करने पर कारण बताऔ नोटिस दिया गया साथ ही विश्लेषण रिपोर्ट की एक प्रति भी भेजी गई उक्त नोटिस का जवाब उन्होने अपने पत्र क्रमांक एस/एम/एल/सी सी/7 दिनांक 18-8-94 द्वारा भेजी प्रति संलग्न है सायनामिड इण्डिया लि के डायरेक्टर्स की सूची मय पत्र दिनांक 18-3-94 सायनामिड इण्डिया की पाटो प्रति संयुक्त निदेशक कुषि पी सं राज जयपुर से प्राप्त हुई जो सलग्न है

**Cr. Msc. Petition 495/01**

"**6.** यह है कि दिनांक 23.11.1994 तक विश्लेषक द्वारा उक्त नमूने का विश्लेषण किया गया व विश्लेषण रिपोर्ट विश्लेषक द्वारा इस कार्यलय को दिनांक 23.11.1994 को भेजी गई । विश्लेषण के मुताबिक उक्त नमूना फेनवलरेट 20 ई.सी. बैच नं. 2423 कीटनाशक अमानक पाया गया । उक्त जांच रिपोर्ट की एक प्रति मय नोटिस अभियुक्त को दिनांक 05.12.1994 को भेजी गई । इसके जवाब मे स्पष्टीकरण प्राप्त हुआ जो संलग्न है । इसके अलावा दिनांक 05.12.1994 को इस कीटनाशक की जांच रिपोर्ट एक प्रति मय नोटिस वितरण प्रोपराइटर लक्ष्मी एजेन्सीज मेहता हाऊस, जी-1, अशोक मार्ग, सी-स्कीम, जयपुर एवं निर्मता मैनेजर सर्ल इण्डिया लिमिटेड 21-डी, खुदवाला मार्ग, बम्बई को भी भेजी गई । इनके जवाब मे स्पष्टीकरण प्राप्त हुआ जो संलग्न है ।"

On a perusal of complaint, itself, in both the petitions, ibid, there is no iota of allegation that petitioners were in-charge of or responsible to the Company for conduct of its business. It is settled that for criminal liability, penal action must be strictly construed and there is no vicarious liability in criminal law unless

statute takes that also within its fold. S.33 of the Act deals with offences by Companies but does not make all the Directors liable for commission of offence by Company merely because of their holding office of Directors or in other capacity. These questions have been examined by Apex Court in **State of Haryana Vs. Brijlal Mittal (AIR 1998 SC 2327)** and by Co-ordinate Bench of this Court in **Bharat Insecticides Ltd vs. State (supra)** and in recent DB decision in **Cadila Health Care Ltd Vs. State (supra).**

**In State of Haryana Vs. Brijlal Mittal (supra)**, Apex Court observed ad infra:

> "It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that

> the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business."

In recent DB decision in **Cadila Health Care Ltd Vs. State (supra),** after having taken note of all decisions rendered by Apex Court, this Court finally observed while examining scope of S.34 of the Act ad infra: -

> "**21.** The crucial test which has been laid down by the Hon'ble Supreme Court on the issue of Director being 'in charge of' & 'responsible to the company for the conduct of business of the company' as required under section 34 of the Act is that the Director is concerned with the day-to-day working of the company, or in other words, for over-all control of the day-to-day business of the company or firm which excludes Directors connected with policy of the company. The Director may not be in charge of business of the company or may be in charge of business of the company but not over all in charge or may be in charge of only some part of business and further test as regards averments/ allegations made in the complaint,

> the Supreme Court had laid down that words mentioned in the section are not the magic words but the substance of the allegations be read as a whole. ”

In view of above observations, very complaint filed against petitioners in both the petitions is not sustainable as it completely lacks of particulars as provided U/s 33 of the Act.

As regards contentions with regard to expiry of shelf life of sample in question depriving them of their right U/s 24(4)of the Act, suffice is to say that in both the petitions, petitioners have submitted their reply while controverting report of State Laboratory within 28 days of receipt thereof and intending to adduce evidence in support of their defence, and requesting for getting referee sample re-tested through Central Laboratory as provided U/s 24 of the Act, but the Insecticide Inspector did not advert to their request and in one petition, by the time, sample in question was sent to the Central Laboratory, shelf life whereof had expired. In order to safeguard right of accused so as to have sample re-tested through Central Laboratory, it is incumbent upon prosecution to file complaint expeditiously so that accused may

not be deprived of his right as provided under the Act.

In **State of Hariana Vs. Unique Farmaid (supra)** Apex Court observed ad infra :

> **"11.** .. The procedure for testing the sample is prescribed and if it is contravened to the prejudice of the accused, he certainly has the right to seek dismissal of the complaint. There cannot be two opinions about that. Then in order to safeguard the right of the accused to have the sample tested from the Central Insecticides Laboratory, it is incumbent on the prosecution to file the complaint expeditiously so that the right of the accused is not lost. In the present case, by the time the respondents were asked to appear before the Court, the expiry date of the insecticide was already cover and sending of the sample to the Central Insecticides Laboratory at that late stage, would be of no consequence. This issue is no longer res integra. In **State of Punjab Vs. National Organic Chemical Industries Ltd (1996(11) SCC 613**), this Court in somewhat similar circumstances said that the procedure laid down under section 24 of the Act deprived the accused to have the sample tested by the Central Insecticides

> Laboratory and adduce evidence of the report so given in his defence. This Court stressed the need to lodge the complaint with utmost despatch so that the accused may opt to avail the statutory defence. The Court held that the accused had been deprived of a valuable right statutorily available to him."

As regards Manufacturing Company, their sales Manager, dealers, distributors & their partners, although plea of S.33 of the Act is not available to them but in the facts of instant case, petitioners herein have been deprived of their valuable right to get sample re-tested from Central Laboratory U/s 24(4) of the Act, as they have filed reply, where report of State Laboratory has been controverted and they intended to lead evidence and once they intended to adduce evidence to controvert report of State Laboratory, such report cannot be read as conclusive evidence against them. This fact remained undisputed that on first opportunity afforded to petitioners upon taking cognizance; by that time, shelf life of referee sample has expired, which resulted in infringement and depriving of their right conferred U/s 24(4) of the Act; in such circumstances, no purpose will

be served to prosecute these petitioners, as well in the facts of instant case.

Since this Court is satisfied on both the counts, question raised with regard to order of written consent obtained U/s 31(1) being violative of the Act, is left open for consideration in appropriate case.

It is true that this Court would always be reluctant to consider such cases at initial stage of trial and inherent powers U/s 482, CrPC are to be exercised very sparingly in exceptional cases. However, objection raised herein goes to the root of prosecution and manifestly show that if criminal proceedings are allowed to continue then it would amount to abuse of process of law. In the facts of instant case, ibid, allowing the complaint to stand against petitioners is nothing but an abuse of process of law.

Before parting with this order, this Court would like to express that the manner in which such cases are instituted and prosecuted by complainant, is of casual nature and there is no application of mind either by complainant or the Authority granting sanction either on facts or on relevant law. Cases are instituted after inordinate delay and by that time, shelf life of

the sample, itself, stands expired and despite State Analyst report being controverted, no steps are taken either by complainant or by Courts, as well to get sample re-tested by Central Laboratory during shelf life of the sample.

This has been consistent view expressed by Apex Court and this Court as regards vicarious liability of those officers/partners/Directors who are in-charge of or responsible to the Company for conduct of its business on the date of commission of offence, which has to be disclosed in complaint but experience shows that complaints are filed in a routine formate style and it is nowhere examined as to how person accused of can be held vicariously liable in regard to commission of offence on the part of the Company/Firm, as the case may be. On these technical reasons and lapses, accused arrayed in complaint are discharged or acquitted.

Time has come when concerned authorities may take steps and order that such lapses observed (supra) may not be perpetuated further in future. Chief Secretary of State is directed to issue instructions in the light of observed (supra) to authorities concerned empowered to file complaints under Insecticide Act, Drugs &

Cosmetics Act, PFA Act, or any other law in which such precautions are required to be taken.

Consequently, both the misc. petitions are hereby allowed. Complaints and further proceedings as against petitioners initiated in Cr. Case Nos.217/95 & 06/96 respectively pending before ACJM No.3, Ajmer and Judl. Mag. No.3, Jaipur District are hereby quashed and set aside. Records, if received, be sent back forthwith to the courts below. Stay petitions also stand disposed of.

A copy of this order be sent to the Chief Secretary of the State for necessary action as observed (supra) in accordance with law.

(**Ajay Rastogi), J.**

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